

Disability Employment Law Overview

for Return-to-Work Coordinators



**Creating Employment Opportunities
for Californians with Disabilities**



THE 10 COMMANDMENTS of Communicating with People with Disabilities

- I. Speak directly rather than through a companion or sign language interpreter who may be present.
- II. Offer to shake hands when introduced. People with limited hand use or an artificial limb can usually shake hands and offering the left hand is acceptable greeting.
- III. Always identify yourself and others who may be with you when meeting someone with a visual disability. When conversing in a group, remember to identify the person to whom you are speaking.
 - When dining with a friend, who has a visual disability, ask if you can describe what is on his or her plate.
- IV. If you offer assistance, wait until the offer is accepted. Then listen or ask for instructions.
- V. Treat adults as adults. Address people with disabilities by their first names only when extending the same familiarity to all others. Never patronize people in wheelchairs by patting them on the head or shoulder.
- VI. Do not lean against or place your hand on someone's wheelchair. Bear in mind that people with disabilities treat their chairs as extensions of their bodies.
- VII. Listen attentively when talking with people who have difficulty speaking and wait for them to finish. If necessary, ask short questions that require short answers, or a nod of the head. Never pretend to understand; instead repeat what you have understood and allow the person to respond.

- VIII. Place yourself at eye level when speaking with someone in a wheelchair or on crutches.
- IX. Tap a person who has a hearing disability on the shoulder or wave your hand to get his or her attention. Look directly at the person and speak clearly, slowly, and expressively to establish if the person can read your lips. If so, try to face the light source and keep hands, cigarettes and food away from your mouth when speaking.
- If a person is wearing a hearing aid, don't assume that they have the ability to discriminate your speaking voice.
 - Never shout at a person. Just speak in a normal tone of voice.
- X. Relax. Don't be embarrassed if you happen to use common expressions such as "See you Later" or "Did you hear about this?" that seem to relate to a person's disability.

This video is available on loan to state departments through the State Personnel Board. For video request form, go to SPB's website: www.spb.ca.gov/CIVILRIGHTS/disability_info.htm

"The 10 Commandments" were adapted from many sources as a public service by United Cerebral Palsy Associations, Inc. (UCPA). UCPA's version of "The Ten Commandments" was updated by Irene M. Ward & Associates (Columbus, Ohio), also as a public service, and to provide the most current language possible for its video and DVD entitled, "The 10 Commandments of Communicating with People with Disabilities".

Video & Trainer Guide, distributed by: Program Development Associates, Post Office Box 2038, Syracuse, NY 13220-2038. Phone: 800-543-2119, Fax: 315-452-0710. Web site: www.disabilitytraining.com

DISABILITY EMPLOYMENT LAW

- Prohibits employment discrimination against individuals with disabilities.
- Requires employers and employees to engage in a timely, good faith, interactive process to make a reasonable accommodation to a known physical or mental limitation.
- Allows an exception to providing such an accommodation if it would impose an undue hardship on the employer or pose a direct threat to an individual with a disability or others.

APPLICABLE LAWS

STATE

- Fair Employment and Housing Act (FEHA)
- Assembly Bill 2222 (2001)
- Assembly Bill 925 (2002)
- Assembly Bill 1950 (2003)
- Government Code Sections 11135 and 19170

FEDERAL

- Title I and Title IV of the Americans with Disabilities Act (ADA)
- Rehabilitation Act of 1973
- Telecommunications Act of 1996

INDIVIDUAL LIABILITY

INDIVIDUALS MAY BE LIABLE AS:

- Harassers
- Any person who retaliates against a person who engages in protected activity
- Any person who aids or abets conduct prohibited by FEHA

EMPLOYMENT PRACTICES COVERED

Includes but not limited to:

PRE-EMPLOYMENT

- Recruitment
- Application
- Medical Exam/Inquiry
- Testing
- Hiring

EMPLOYMENT

- Evaluation
- Disciplinary Actions
- Training
- Promotion
- Fitness For Duty Exams
- Layoff/Call Back
- Termination Procedures
- Compensation
- Leaves
- Benefits

CRITERIA THAT MUST BE MET TO BE PROTECTED BY DISABILITY EMPLOYMENT LAW

- A physical or mental disability or medical condition that limits one or more major life activities.
- A record or history of such an impairment known to the employer.
- Being regarded or treated as having such an impairment even if it has no present disabling effects.
- By association with a person who has a disability.

Note: The categories listed above are the 3 most common ways an individual with a disability is protected. Please review FEHA for specific definitions.

QUALIFIED FOR THE JOB

Any applicant or employee must be qualified for the job.

- 1) The applicant or employee must meet the necessary prerequisites (minimum qualifications or MQ's) of the job such as:
 - Education
 - Work Experience
 - Training
 - Skills
 - Licenses
 - Certificates
 - Other job related requirements(Examples: using good judgment, ability to work with people, etc.)
 - 2) The applicant or employee must be able to perform the essential functions of the job **with or without reasonable accommodation**.
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ESSENTIAL FUNCTIONS

- The position exists to perform the function.
- There are a limited number of other employees available to perform the function or among whom the function can be distributed.
- A function is highly specialized, and the person in the position was hired for their special expertise and ability.

REASONABLE ACCOMMODATION

BASIC PRINCIPLES

- Both parties are required to engage in a **timely, good faith, interactive** process.
- Generally, the individual with a disability informs the supervisor of the need for reasonable accommodation. There may be situations where the employer may decide to be pro-active in providing an accommodation for a known disability on a case-by-case basis.
- Reasonable accommodations are required for an employee with a disability when there are barriers to performing essential functions of the job.
- It is the responsibility of the employer and employee to work together to make appropriate accommodation choices, as long as the choices are effective.
- An individual is NOT required to accept an accommodation that assists them in performing the essential job functions. However, if an employee refuses an accommodation that would have effectively removed the barriers and allowed the employee to perform the essential job functions, the employee may be deemed to have failed to cooperate with the interactive process.

Note: Assembly Bill 1950 amends CA Government Code Section 19170 to provide for state employees with disabilities an additional 6 months probationary period, subject to the approval of the State Personnel Board, to provide a reasonable accommodation to the employee and for the employee to demonstrate their ability to satisfactorily perform the essential functions of the job.

INTERACTIVE PROCESS

- 1) Generally, the individual with a disability informs the supervisor of the need for a reasonable accommodation. However, there may be situations where the employer may need to be pro-active in providing an accommodation for a known disability on a case-by-case basis.
- 2) If necessary, the employer may gather medical or other pertinent information and documentation to substantiate the need for a reasonable accommodation and to identify the barriers that impact the person's ability to perform the essential functions of the job.
- 3) The employer and employee both explore all possible reasonable accommodation solutions. Both parties assess the reasonableness of each accommodation in terms of effectiveness and equal opportunity for the employee.
- 4) The employer implements the most effective solution, taking into consideration the employee's preferences and that does not impose an undue hardship on the employer's operation.
 - It is the employer's responsibility to choose the specific accommodation after giving consideration to the preferences of the employee or applicant. An accommodation need not be the best accommodation available as long as it is effective.
 - An individual is NOT required to accept an accommodation necessary to perform the essential functions of the job. However, if an employee refuses an accommodation that would have effectively removed the barriers and allowed the employee to perform the essential functions, the employee may be deemed to have failed to cooperate with the Interactive Process.
- 5) It is the employer's responsibility to engage in ongoing monitoring for effectiveness of the accommodation(s) and any changes in the employee's ability to perform the essential functions of the job.

REASONABLE ACCOMMODATION

EXAMPLES

- Making existing facilities accessible to and useable by workers with disabilities
- Job restructuring
- Modifying work schedules
- Reassignment to a vacant position
- Adjusting or modifying exams, training, materials or policies
- Acquiring or modifying equipment or devices
- Providing qualified readers or interpreters

DISABILITY INQUIRIES

What questions may be directed to an individual depend largely upon whether the individual is an applicant for a position or is currently employed by the employer.

- Medical examinations are only allowed after a conditional job offer is made.
- Post-offer medical examinations are permissible only where all entering employees in similar positions are required to submit to such exams.
- The results of a medical examination are treated as confidential medical records and must be maintained in separate files.
- Any medical related inquiries must be job related and consistent with business necessity.
- Medical inquiries to help determine the most appropriate reasonable accommodation may be obtained but must be limited to the individual's functional limitations rather than the nature of the severity of the disability or diagnosis.

Consult with your Personnel office or ADA Coordinator. Some agencies or departments may already have procedures and forms available.

INTERVIEW ETIQUETTE

- Focus on Ability NOT DIS-ability.
- Most of the time the applicant or employee will be the one to disclose the disability. Obvious disabilities can only be addressed as far as functional limitations that may affect the ability to do the essential functions of the job.
- An applicant or employee is not required to disclose a disability. However, applicants and employees that have a functional limitation that would affect their ability to do the essential functions of the job are encouraged to disclose so that the interactive reasonable accommodation process can begin.
- An employer has a right to hire the most qualified applicant who can perform the essential functions of the job. However, the employer must provide equal opportunity for everyone to compete for the position.
- For a known disability only the functional limitation(s) should be addressed, not the disability.
- Never seek the “nature or severity” (i.e. the diagnosis) of the disability (this one goes beyond “etiquette”: it is illegal)
For example, you should never ask the person:
“What is wrong with you, what do you have?”
“How bad is your condition, is that going to get worse?””

UNDUE HARDSHIP

The concept of undue hardship includes any action that is:

- 1) Unduly costly*
- 2) Extensive
- 3) Substantial
- 4) Disruptive, or
- 5) That would fundamentally alter the nature or operation of the business.

*The nature of the cost of an accommodation that is considered in determining undue hardship will be the actual cost to the employer.

HEALTH AND SAFETY OF AN INDIVIDUAL WITH A DISABILITY OR OTHERS

The accommodation presents a risk of harm to self or others in such a way that it meets **all** of the following criteria:

1. Significant risk of substantial harm
2. The specific risk must be identified
3. The risk must be current, not one that is speculative or remote
4. The assessment of risk must be based on objective medical or other factual evidence regarding a particular individual

If the 4 criteria above are met, the employer must consider whether the risk can be eliminated or reduced below the level of “direct threat” by reasonable accommodation.

COMPLAINT PROCEDURES

In State Government

The California Department of Fair Employment and Housing (DFEH), the Federal Equal Employment Opportunity Commission (EEOC) and the State Personnel Board (SPB) maintain the authority to investigate complaints of employment discrimination.

Discrimination complaints can be filed with the Federal Equal Employment Opportunity Commission (EEOC) for alleged violations of the federal Americans with Disabilities Act.

- If the state agency exists in California, the Federal EEOC advises that the state entity (DFEH) should pursue the investigation first.
- An employee/applicant has **one year** from the alleged discrimination to file the complaint with DFEH.

For more information about the discrimination complaint process, contact:

California Department of Fair Employment and Housing

Phone: (800) 884-1684

Sacramento and Out of State: (916) 227-0551

TTY Number: (800) 700-2320

Website: www.dfeh.ca.gov/complaint.asp

Federal Equal Employment Opportunity Commission

Phone: (800) 669-4000

TTY: (800) 669-6820

Los Angeles Phone: (213) 894-1000

Los Angeles TTY: (213) 894-1121

San Francisco Phone: (415) 356-5100

San Francisco TTY: (415) 356-5098

Website: www.eeoc.gov

State Personnel Board

801 Capitol Mall, Sacramento, CA 95814

P.O. Box 944201, Sacramento, CA 94244-2010

Phone: (916) 653-1705

Website: www.spb.ca.gov

CASE SCENARIO EXERCISES

Team Instructions: Review and discuss assigned case scenarios as a team. Identify an appropriate and effective course of action(s) for each individual.

A physician's evaluation of a candidate who is offered a position as Psychiatric Technician indicates that the individual has a disc condition that might worsen in 8-10 years, if required to do heavy lifting. The Department concludes that to allow the person to perform the duties of a Psychiatric Technician would pose a "direct threat" to his health and safety and withdraws its offer of employment.

A candidate who is blind was denied a reasonable accommodation request for a reader in the written examination for a Dispatcher job with the California Highway Patrol. A key part of the written test included a test of the candidate's ability to read detailed street maps quickly in order to dispatch emergency help.

A Registered Nurse who had been medically separated from her position at a State hospital attempts to reinstate at the veterans' home. In checking her references, the veterans home learns from the State hospital that the individual had filed a Worker's Compensation claim for a back injury. Based on this information, it decides not to reinstate the individual. The individual files a charge of discrimination against the veteran's home and a charge of violation of civil rights against the state hospital, seeking \$300,000 in damages from both agencies.

A Rehabilitation Counselor who uses a wheelchair, a walker, and a cane to assist with her mobility applies for a transfer to a vacant Counselor position at a State hospital. The position is on a Nursing Unit which houses patients who are known to display violent tendencies. The interviewing panel does not express any concerns about her ability to do the job. She has had several years of experience working with similar types of patients. She is conditionally offered the job following a medical examination. The Medical Officer who reviewed the information considered her as medically disqualified because of her confinement to a wheelchair which would place

her at imminent and substantial risk of harm in the event of a violent disturbance and not being able to quickly evacuate the Nursing Unit.

A Registered Nurse at a State hospital is injured on the job and cannot perform the essential functions of her job. She accepts a voluntary demotion to a Clerical position that the hospital offered. Over several months, she recovers from her injuries and is cleared to return to Nursing duties. The hospital refuses to return her to a Nursing position and argues that her return rights are discretionary since the demotion was voluntary.

A hospital Peace Officer sustains a job related injury and can no longer perform the essential functions of his job. He requests an alternate placement. There are no appropriate vacant positions at the hospital. The hospital denies his request and sends him to vocational rehabilitation. Upon completion of the vocational rehabilitation, the hospital medically separates the employee.

LOCAL RESOURCES

Having knowledge of available resources is important. From pre-hire to retirement, there are many questions that may arise about decisions that affect the workplace. Listed below are resources available when employment related questions arise. (Please fill in contact information where appropriate.)

Internal Agency Resources

- Your Supervisor
- Equal Employment Office Manager or ADA Coordinator:
Contact information: _____
- Your Legal Counsel:
Contact information: _____

External Agency Resources



Enforcement & Technical Assistance

- Equal Employment Opportunity Commission (EEOC) - Federal
- Department of Fair Employment and Housing (DFEH) - State
- State Personnel Board (SPB) – State

Technical Assistance only

- Department of Rehabilitation (DOR), Disability Access Section
- Job Accommodation Network (JAN)

WEB RESOURCES

- **California Department of Rehabilitation**
www.dor.ca.gov
Information on the Disability Access Section may be accessed from the home page under “Disability Access and Rights in California.”
- **California Disability Access Information**
www.disabilityaccessinfo.ca.gov
Information and links on the major laws, regulations, and areas of interest regarding disability rights and access for persons with disabilities.
- **California State Personnel Board (SPB)**
www.spb.ca.gov
 - 1) The Limited Examination and Appointment Program (LEAP) may be accessed from the home page under “Special Programs.”
 - 2) SPB Policy Memo (Pinkie) “Pre-Employment Medical Evaluation Subject to Proper Placement” dated July 9, 1993, may be accessed from: www.spb.ca.gov/docs/pinkies.htm
- **California Fair Employment and Housing Agency** 
www.dfeh.ca.gov
DFEH publications may be accessed from the homepage by clicking on “Publications” on the left, then “Employment Discrimination.”
- **Department of Personnel Administration** www.dpa.ca.gov
Personnel Management Liaison Memo 2001-031 “Revised Requirements under the California Fair Employment and Housing Act (FEHA)” dated August 15, 2001, may be accessed from:
www.dpa.ca.gov/textdocs/fpmlist.htm
- **Job Accommodation Network** www.jan.wvu.edu 
- **AT (Assistive Technology) Network** www.atnet.org
- **Department of Justice** www.usdoj.ca.gov
ADA Home Page may be accessed from:
www.usdoj.gov/crt/ada/adahom1.htm

FACT SHEET

Disability Access Section

The California Department of Rehabilitation (DOR) was designated by the Office of the Governor to serve as the lead state agency in California's efforts to implement the Americans with Disabilities Act (ADA) in state government. The Disability Access Section (DAS) was established in 1992 to promote disability rights in state government and DOR partnerships in the community.

The Section serves as a centralized resource for providing public information, training, and technical assistance on the Fair Employment Housing Act (FEHA), ADA, and other related disability laws to state entities, agencies, and One-Stop service delivery systems serving persons with disabilities and employers. Our dedicated staff has 150+ collective years of professional experience in training, employment service, vocational rehabilitation, physical access, and program assessment.

We provide comprehensive consulting services and technical assistance in the following areas:

- Disability Awareness
- Employment Issues
- Accessibility to Programs and Services
- Physical Access Surveys
- Publications
- Referrals and Resources

For additional information on services our Section provides, or to order publications, please contact:

Phone: (916) 263-8674

TTY: (916) 263-8672

FAX: (916) 263-8671

For additional information on interagency agreements with State government entities and our training services, please contact:

DAS Training Coordinator

Phone: (916) 263-8695 or

E-mail: dastraining@dor.ca.gov

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